

多邊暫行上訴仲裁安排之首例

——試比較與「土耳其—藥品案」程序協議之差異

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摘要

去(2022)年12月21日「哥倫比亞—冷凍薯條案」之仲裁判斷終於出爐，作為首件利用「多邊暫行上訴仲裁安排」進行上訴審查之案件，具有一定之里程碑意義。另一方面，「哥倫比亞—冷凍薯條案」雖與「土耳其—藥品案」同為利用《爭端解決規則與程序瞭解書》第25條之仲裁程序以替代上訴之案件，且兩者之仲裁程序協議內容非常相似，不過僅前者屬於「多邊暫行上訴仲裁安排」之案件，其所代表之意涵為何，本文試分析之。

本中心曾於經貿法訊第305期指出「土耳其—藥品案」(*Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*)為首件利用《爭端解決規則與程序瞭解書》(Understanding on Rules and Procedures Governing the Settlement of Disputes, DSU)第25條之仲裁規定，以個案式仲裁替代上訴的案件¹。且於同篇指出「多邊暫行上訴仲裁安排」(Multi-Party appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, MPIAA)——雖同樣為利用DSU第25條之仲裁，但屬於制度性仲裁²——在美國的打壓下，可能無法順利發展³。然而，於去(2022)年10月6日，哥倫比亞通知爭端解決機構(Dispute Settlement Body, DSB)訴請以MPIAA就「哥倫比亞—冷凍薯條案」(*Colombia – Anti-Dumping Duties on Frozen Fries from Belgium*,

¹ Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, para. 1, WTO Doc. WT/DS583/10 (Mar. 25, 2022) [hereinafter Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey — Pharmaceutical Products* (EU)]; Understanding on Rules and Procedures Governing the Settlement of Disputes art. 25. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; 李子維，蘇意晴，〈《爭端解決規則與程序瞭解書》第25條仲裁替代上訴程序〉，政治大學國際經貿組織暨法律研究中心經貿法訊，305期，頁6-7，網址：<http://www.tradelaw.nccu.edu.tw/epaper/no305/3.pdf>（最後瀏覽日：2023年1月10日）。

² Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, at.1, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020) [hereinafter MPIAA].

³ 劉真好，〈美國否決替代WTO上訴計畫方案〉，WTO及RTA電子報，695期（2020）。

Germany and the Netherlands)」(以下簡稱本案)之小組報告進行上訴審查,而仲裁判斷亦於同年 12 月 21 日出爐⁴。

MPIAA 的實質中心思想與被癱瘓的上訴機構制度在程序及實體面上有著異曲同工之妙,皆期望 WTO 爭端解決制度能有更正小組裁決錯誤的機會,並確保法律適用之一致性。是以 MPIAA 終於獲得實踐應是長期主張 WTO 爭端解決應為二審制的歐盟最大的勝利。不過或許是礙於美國先前對 MPIAA 之批評,哥倫比亞與歐盟有關本案上訴將利用 DSU 第 25 條仲裁之程序協議,並不直接使用 MPIAA 一詞⁵。只是在展開第 25 條程序後,歐盟於上訴書狀已不諱言本案正是首件利用 MPIAA 之案件⁶。二個多月後,本案之仲裁人也不負歐盟等 MPIAA 參與會員之期待,及時在 90 天的期限內,以僅 39 頁的篇幅做出了仲裁判斷,證明 MPIAA 之上訴審查可以同時達成及時與精簡⁷。

以下說明「哥倫比亞—冷凍薯條案」與「土耳其—藥品案」之替代上訴仲裁協議相似之處,並指出「土耳其—藥品案」之替代上訴仲裁協議極力向 MPIAA 靠攏之證據,最後探討替代上訴仲裁之前景。

一、兩案之替代上訴仲裁程序協議相仿

比較兩者之替代上訴程序協議文本,均開宗明義地表明其係利用 DSU 第 25 條之程序,且係以上訴機構無法執行上訴程序為此仲裁替代上訴程序發動之條件⁸。另外兩程序協議針對爭端解決小組報告如何移交給仲裁人之程序、仲裁判斷公布期限、或是類推適用上訴審查工作程序相關條文的規範皆完全相同⁹。

⁴ Recourse to Article 25 of the DSU Constitution of the Arbitrator, Note by the Secretariat, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, para. 2, WTO Doc. WT/DS591/8 (Oct. 12, 2022); Arbitration Under Article 25 of the DSU, Award of the Arbitrators, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, WT/DS591/ARB25 (Dec. 21, 2022).

⁵ Agreed Procedures for Arbitration Under Article 25 Of The DSU, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, WT/DS591/3/Rev.1 (Apr. 22, 2021) [hereafter Agreed Procedures for Arbitration Under Article 25 of the DSU, *Colombia – Frozen Fries*].

⁶ EUR. UNION, ARBITRATION UNDER THE MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU, *COLOMBIA - ANTI-DUMPING DUTIES ON FROZEN FRIES FROM BELGIUM, GERMANY AND THE NETHERLANDS* para. 7 (2022) [hereinafter APPELLEE'S SUBMISSION] (“The European Union notes that this is the first appeal to be decided under appeal arbitration procedures agreed by the parties pursuant to the “Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU”....”).

⁷ Hannah Monicken, *In First Test, MPIA Puts Out Restrained, Timely Appeal Result*, INSIDE U.S. TRADE (Dec. 21, 2022), Vol. 40, No. 51, Dec. 21, 2022.

⁸ Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey – Pharmaceutical Products (EU)*, *supra* note 1, paras. 1-2; Agreed Procedures for Arbitration Under Article 25 of the DSU, *Colombia – Frozen Fries*, *supra* note 5, paras. 1-2.

⁹ Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey – Pharmaceutical Products*

事實上，若再將兩案之程序協議與 MPIAA 進行比較，更可發現兩程序協議除了未列舉 MPIAA 附件 1 之前言內容外（如 MPIAA 之創立目的、訴訟程序之法源等），與附件 1 之內容基本上極為相似¹⁰。因此若僅從這部分觀察，實在很難區分兩者之差異。

二、「土耳其—藥品案」之替代上訴仲裁程序協議極力向 MPIAA 靠攏

無論兩者程序協議如何與 MPIAA 近似，土耳其畢竟不是 MPIAA 參與國，並未事先同意 MPIAA 的某些體制上設計，因此直接將這些設計反映於替代上訴程序協議中而不經調整，勢必有其困難¹¹。最具體的就是仲裁人之選任問題：土耳其與歐盟所同意之程序協議，並不像 MPIAA 或是「哥倫比亞—冷凍薯條案」之替代上訴程序，利用 MPIAA 所設立的仲裁人庫制度，直接從十人仲裁人庫中選出三名擔任案件之仲裁人¹²。不過，從土耳其最後所同意的仲裁人選任方式看來，或許是因為歐盟之堅持，在相當程度內仍然受到 MPIAA 的影響。根據該程序協議，仲裁人來源除了前上訴機構成員外，就是 MPIAA 仲裁人庫；而且為了避免三名成員皆挑選前上訴機構成員，於程序協議中甚至明文若在歐盟與土耳其同時繫屬之另一爭端案件「歐盟—鋼鐵防衛措施案（*European Union — Safeguard Measures on Certain Steel Products*）」中，選了兩名前上訴機構成員擔任替代上訴之仲裁人，則本案就必須選任兩名 MPIAA 仲裁人擔任仲裁人，換言之，在這種情況下，本案之替代上訴程序只能有一名是前上訴機構成員¹³。然若這兩件上訴程序互綁的案件只有一件提出上訴，則三名仲裁人之挑選方式為先自 MPIAA 仲裁人與前上訴機構成員中各挑選一名，然後再從協議所規定之仲

(EU), *supra* note 1, paras. 4, 11-12; Agreed Procedures for Arbitration Under Article 25 of the DSU, *Colombia — Frozen Fries*, *supra* note 5, paras. 4, 11-12.

¹⁰ Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey — Pharmaceutical Products* (EU), *supra* note 1; Agreed Procedures for Arbitration Under Article 25 of the DSU, *Colombia — Frozen Fries*, *supra* note 5; MPIAA, *supra* note 2, Annex 1.

¹¹ MPIAA, *supra* note 2, at 1.

¹² *Id.* para. 4 (“In particular, the participating Members envisage that, under the appeal arbitration procedure, appeals will be heard by three appeal arbitrators selected from the pool of 10 standing appeal arbitrators composed by the participating Members....”); Agreed Procedures for Arbitration Under Article 25 of the DSU, *Colombia — Frozen Fries*, *supra* note 5, para. 7; Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey — Pharmaceutical Products* (EU), *supra* note 1, para. 7.

¹³ Agreed Procedures for Arbitration Under Article 25 of the DSU, *Turkey — Pharmaceutical Products* (EU), *supra* note 1, para. 7 (“The arbitrators shall be three persons randomly selected, in the physical presence of representatives of the parties, from a combined list of former Appellate Body Members and appeal arbitrators. The random selection will be conducted at the same time as the random selection in DS595 *European Union — Safeguard Measures on Certain Steel Products*, so as to ensure that one randomly selected appeal is heard by two former Appellate Body Members and one MPIA appeal arbitrator whilst the appeal in the other dispute is heard by one former Appellate Body Member and two MPIA appeal arbitrators. If there is only one appeal it will be heard by one former Appellate Body Member, one MPIA appeal arbitrator, and the third person shall be drawn at random from the remaining persons on the combined list.”).

裁人來源中隨機選任一名¹⁴。

不同案之仲裁人應有所交流以便確保法律見解一致的設計，則是「土耳其—藥品案」之替代上訴程序極力向 MPIAA 靠攏的另一點。根據其程序協議，與其在上訴程序互綁的「歐盟—鋼鐵防衛措施案」之仲裁人，當必要時可互相收到另一案之上訴資料，而且可在與當事國諮商後，通知另一案仲裁人相關爭點¹⁵。明明一案涉及的是國民待遇、自製率，另一案涉及的是貿易救濟，但協議中卻明文要讓兩案仲裁人有資訊交流的機會，以促進兩案裁決之一致性、連貫性、相容性¹⁶。除了證明歐盟極力將 MPIAA 協議之第 5 點輸出至所有與其締結替代上訴個案仲裁之協議外，實在沒有更合理的解釋了¹⁷。

三、替代上訴仲裁前景

或許有以為個案式之替代上訴仲裁，如「土耳其—藥品案」之上訴仲裁既得以遂行，則 MPIAA 參與成員是否擴大，應已無關緊要。然此種看法可能忽略「土耳其—藥品案」之特殊背景。首先，土耳其與歐盟原本即有關稅同盟之友好關係，這與許多爭端解決當事國間之關係並不相同¹⁸。另一方面，「土耳其—藥品案」之當事方—歐盟及土耳其，同時有另一案件「歐盟—鋼鐵防衛措施案」繫屬¹⁹。事實上，在歐盟於「歐盟—鋼鐵防衛措施案」中之抗辯遭到小組駁回之同時，土耳其於「土耳其—藥品案」中之抗辯也剛好未被採納²⁰。換言之，若沒有這種上訴利益相互牽制的情況，歐盟擬說服與其有爭端之對手國簽訂以 MPIAA 為基礎的個案式仲裁替代上訴協議，應該是相當困難。

¹⁴ *Id.*

¹⁵ *Id.* para. 8 (“In order to promote consistency and coherence in decision making in this dispute and in dispute DS595 European Union — Safeguard Measures on Certain Steel Products, the arbitrators may, upon consultation of the parties, inform the arbitrators in the other dispute of the issues susceptible to be adjudicated...Where necessary, the arbitrators in both appeals may receive any document relating to the other appeal.”).

¹⁶ *Id.*

¹⁷ MPIAA, *supra* note 2, para. 5 (“Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.”)

¹⁸ *EU-Türkiye Customs Union*, EUR. COMM’N, <https://trade.ec.europa.eu/access-to-markets/en/content/eu-turkiye-customs-union> (last visited Jan. 10, 2023).

¹⁹ Panel Report, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583/12 (Apr. 28, 2022) [hereinafter Panel Report, *Turkey — Pharmaceutical Products (EU)*]; Panel Report, *European Union — Safeguard Measures on Certain Steel Products (DS595)*, WT/DS595/R (adopted May 31, 2022) [hereinafter Panel Report, *EU — Safeguard Measures on Steel (Turkey)*].

²⁰ Panel Report, *Turkey — Pharmaceutical Products (EU)*, para. 8.1; Panel Report, *EU — Safeguard Measures on Steel (Turkey)*, para. 8.1.

前言曾提及本中心之前報導美國對於「土耳其—藥品案」以個案式仲裁替代上訴持正面看法²¹。然比較「土耳其—藥品案」與本案（「哥倫比亞—冷凍薯條案」）的程序協議，差異實在不大，是以表面上看起來歐盟似毋須大力鼓吹 MPIAA，以擴大參與；但深究「土耳其—藥品案」替代上訴之特殊背景，即可知縱使美國對之看法正面，但仿 MPIAA 之個案式仲裁終究是可遇不可求。

值得後續觀察的是過去對 MPIAA 頗無好感的美國，在本案之替代上訴中亦申請第三方參與²²，目前雖未對本案之上訴仲裁判斷有任何評論²³，不過看在此次三位仲裁人的具體表現頗受好評的份上，其若無意變更既定之不恢復上訴機構運作之立場，則是否會因此緩和其原先對 MPIAA 此替代上訴機制之排斥立場，以便減少各方籲其恢復上訴機構運作之壓力呢？或許是本仲裁判斷出爐後另一值得追蹤之面向。

²¹ U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN GENEVA, STATEMENTS BY THE UNITED STATES AT THE MEETING OF THE WTO DISPUTE SETTLEMENT BODY 7 (2022), https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2022/08/Aug29.DSB_.Stmt_.as_.deliv_.fin_.pdf; 李子維，蘇意晴（註 1），頁 7-10。

²² Arbitration under Article 25 of the DSU, Award of the Arbitrators, Addendum, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, at 37, WT/DS591/ARB25 /Add.1 (Dec. 21, 2022).

²³ Monicken, *supra* note 7.